79-6743

Supreme Court, U. S.
FILED
JUN 10 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

GLOVER ALLISON, :

Petitioner and Appellant, :

- Versus - :

FULTON-DEKALB HOSPITAL AUTHORITY, :

Respondent and Appellee. :

~~ON PETITION FOR WRIT OF CERTIORARI AND~~

APPEAL FROM THE SUPREME COURT OF GEORGIA

CASE NUMBER 35689

~~PETITION FOR WRIT OF CERTIORARI~~

~~AND~~

JURISDICTIONAL STATEMENT

KENNETH G. LEVIN (LEAD COUNSEL)

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INTRODUCTION

In the case below, Petitioner sought to raise as a defense to a suit by a hospital a constitutional challenge to the statutory basis for that suit (making fathers exclusively liable for providing necessaries for their minor children). This defense was filed shortly after this Court's ruling in Orr v. Orr, 440 U.S. 268 (1979), which cast considerable doubt on the constitutionality of that statute.

The defense was raised by written amendment in the trial court prior to any hearing on the merits. The form of the amendment complied in all respects to applicable authority. The constitutional defense was considered and ruled upon by the trial court (holding that the statute was not unconstitutional as applied in this case.)

Then, without support of case law or other authority, the Georgia Supreme Court held that the defense had not been timely presented solely because of the length of time that passed between the completion of discovery and the filing of the amendment and indicated thereby that the trial court had erred in considering the defense. The Court thereby created a serious and totally unnecessary barrier to the right of Georgia courts to decide important federal constitutional questions, especially those arising from new rulings by this Court. This case challenges the validity of that ruling as a violation of Petitioner's right to due process of law.

Petitioner asks that this Court grant a writ of certiorari to review the constitutionality of the Supreme Court's ruling and, ultimately, to remand the case to that Court for full consideration of Petitioner's defense. Alternatively, this

case seeks a ruling by this Court on that the constitutional defense had been timely presented for purposes of this Court's jurisdiction to consider the merits of that defense under this Court's mandatory appellate jurisdiction.

STATEMENT OF JURISDICTION (RULES 15-1(b) AND 23-1(b))

This action originated as a suit on a hospital bill brought against Petitioner under former Georgia Code Section 74-105 which provided as follows:

> Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child. 1/

The suit below alleged that Petitioner was liable for hospital services allegedly furnished his minor child. Prior to the trial of this action, Petitioner amended his Answer to assert that the statute upon which the suit was based violated on its face the equal protection clause of the fourteenth amendment to the United States Constitution. The trial court considered the defense and ruled that the statute was constitutional as applied. The trial court's judgment was rendered April 19, 1979; that Court's Order denying Petitioner's Motion for New Trial is dated July 31, 1979.

Petitioner appealed the constitutional issue to the Georgia Supreme Court, which ruled in a departure from precedent that the presentation of the constitutional defense to the trial court had been untimely. The Judgment of the Supreme Court was

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1/ The duty of a father to provide necessaries for his minor children has been interpreted as obligating him to reimburse a third party that provides necessary medical care to such a child in the absence of a contract. E.g., Blue Ridge Park Nurseries v. Owen, 41 Ga. App. 98, 152 S.E. 485 (1930).

rendered on February 28, 1980. Pursuant to Rule 47 of the Rules of the Supreme Court of Georgia, a timely Motion for Rehearing was filed. That Motion for Rehearing was denied on March 13, 1980.

This petition presents two questions for consideration by this Court. The first is whether the procedural rule announced by the Georgia Supreme Court rendering the presentation of Petitioner's constitutional defense untimely constitutes a denial of due process under the United States Constitution; this question falls within this Court's certiorari jurisdiction. 28 U.S.C. §1257(3). The second is whether former Georgia Code Section 74-105 is on its face violative of the equal protection clause of the Fourteenth Amendment; this question falls within this Court's appellate jurisdiction. 28 U.S.C. §1257(2). In both instances, the judgments for which review is sought are the original decision of the Georgia Supreme Court and the denial of the Motion for Rehearing. A notice of appeal was filed with the Georgia Supreme Court on June 6, 1980.

QUESTIONS PRESENTED (RULES 15-1(c) AND 23-1(c))

1. Where prior to trial a civil defendant raises by written amendment a defense under the United States Constitution, may the state court, consistently with the due process clause of the Fourteenth Amendment, hold without support of precedent that the constitutional defense was not timely raised?

2. Does a state statute placing the burden of providing necessaries for minor children exclusively upon the father violate the equal protection clause of the Fourteenth Amendment?

STATEMENT OF THE CASE (RULES 15-1(d) AND 23-1(e))

On February 5, 1975, Respondent Fulton-DeKalb Hospital Authority (hereinafter the Hospital) sued Petitioner Glover Allison on a bill for the cost of hospital services allegedly furnished his minor daughter (deliverance of a baby and the expenses incident thereto). It is undisputed below that the bill in question was not based on any contractual relationship between the Hospital and Mr. Allison. Instead, the sole legal basis for the Hospital's claim was Georgia Code Section 74-105, which, codifying prior Georgia common law, made the father of a minor child statutorily liable for any necessaries furnished by third parties. (This statute has been since repealed and replaced with one that makes each parent liable.) Mr. Allison denied the debt in his Answer to the suit.

On March 5, 1979, prior to the trial of Mr. Allison's case (indeed, prior to any hearing at all in the case), this Court announced its decision in Orr v. Orr, 440 U.S. 268 (1979), which struck down as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution an Alabama statute making husbands exclusively responsible for alimony in divorce cases. Three days later, the Georgia Supreme Court, following Orr, invalidated various Georgia alimony statutes, which similarly placed the alimony burden solely on the husband. Sims v. Sims, 243 Ga. 275, 253 S.E. 2d. 762 (1979); Stitt v. Stitt, 243 Ga. 413, 254 S.E. 2d. 363 (1979).

Shortly after these decisions - again, prior to any hearing or trial in the case - Mr. Allison amended his Answer to allege that the Georgia statute on which the Hospital's claim was based was violative of the equal protection clause in that it made the father, but not the mother, liable for necessaries

furnished to a minor child by a third party.

The trial court ruled that the statute in question was "not unconstitutional as it applies to this case." This ruling was based, as the lower court judge stated at trial, on a refusal to give "retroactive" application to the decisions of this Court and the Georgia Supreme Court raised in support of Mr. Allison's constitutional defense.

Mr. Allison appealed that ruling to the Georgia Supreme Court which declined to consider the merits of the constitutional issue. Instead, the Court held that the equal protection defense had not been timely raised. Although this defense had been pleaded prior to trial and although the defense had been fully considered by the lower court, the Georgia Supreme Court cited the passage of two years and eleven months between the completion of discovery and the filing of the amendment raising the constitutional defense as the factual basis for its holding that the defense was barred.

On Motion for Rehearing, 2/ Mr. Allison contended that the Court's ruling that the constitutional defense had not been timely raised violated his rights to due process and equal

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2/ The issue of the timeliness of the defense under state procedural law was not raised by any party or court prior to the Supreme Court's ruling in this case. Where the denial of due process has resulted from a ruling of the state Supreme Court, it is sufficient (for the purpose of review by this Court) that Petitioner brings the constitutional error to the attention of

protection of the laws. This Motion was denied. 3/

2/ the State Supreme Court in a Motion for Rehearing. Saunders v. Shaw, 244 U.S. 317 (1917).

3/ Attached to this petition, in addition to the documents specifically required to be attached by this Court's Rule 23, is a copy of the Motion for Rehearing filed by Petitioner in the Georgia Supreme Court. This document shows the manner in which the question of the constitutionality of the Court's ruling on timeliness was presented to that Court, and, as a corollary, the fact that the Georgia Supreme Court necessarily rejected that argument by its denial of the motion.

STATUTORY PROVISIONS (RULE 23-1(d))

The statute, whose constitutionality was challenged below was codified as Section 74-105 of the Georgia Code of 1933 as follows:

> Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child.

This statute, subsequent to the initiation of proceedings below, was revised to provide that each parent would be under such a duty. 1979 Ga.L. 466, 492. Since the rights of the parties in the instant action are governed by the statute as originally worded, Petitioner does not here set out the full text of the revision.

OPINION BELOW (RULES 15-1(a) AND 23-1(a))

The original rulings of the trial court herein, the State Court of Fulton County, bore the style Fulton-DeKalb Hospital Authority, T/A Grady Memorial Hospital v. Glover Allison, and the number 520625. These opinions are not, and will not be, reported. The rulings of the Supreme Court of Georgia in the appeal from the trial court's judgment and denial of Motion for New Trial were styled Allison v. Fulton-DeKalb Hospital Authority and bore the number 35689. They are reported at 245 Ga. 445, ____ S.E. 2d ____ (1980).

REASONS FOR ALLOWANCE OF WRIT (RULE 23-1(h))

A ruling that bars a litigant from presenting a claim or defense may constitute a denial of due process. Saunders v. Shaw, supra; Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 95 (1978). Specifically, this Court has indicated in the clearest terms that the application of a procedural rule that prevents a litigant from asserting a federal constitutional right will be carefully scrutinized. See Henry v. Mississippi, 379 U.S. 443 (1965). 4/ Unless that rule as applied "serves a legitimate state interest ..., the state procedural rule ought not be permitted to bar vindication of important federal rights." Id. at 447-48. The rule must be "a reasonable one and clearly announced to defendant and counsel." Id. at 448, n.3.

The rule announced by the Georgia Supreme Court in the instant case - that the mere passage of time (without the showing of any prejudice) can bar the raising of a constitutional defense - fails both parts of the Henry test:

4/ Although the question discussed in Henry was whether the application of the state procedural rule barred review by the United States Supreme Court (see infra, note - and accompanying text), the central consideration - balancing the state interests allegedly served against the interests of the litigant - is the same as the test used to determine the constitutionality of a state procedural rule as applied. See, e.g., Chambers v. Mississippi, supra at 302.

1. The rule was not clearly announced - It is telling that the Georgia Supreme Court cites no prior cases holding that a constitutional challenge may be barred by time even if it is raised prior to any occasion for its actual consideration by the trial court. There are no such cases.

The Court correctly states the general rule that a constitutional challenge must be raised "at the first opportunity." Brackett v. State, 227 Ga. 493, 181 S.E. 2d 380, 382 (1971). But the previous decisions of that Court had uniformly understood "first opportunity" to refer to the first opportunity for a ruling in the court below. Thus, for example, in Brackett v. State, supra, the Court held that a defendant who is aware of a constitutional claim cannot raise it after the verdict. Nor may it be raised in a Motion for new trial. Loomis v. State, 203 Ga. 394, 405, 47 S.E. 2d 58 (1948); Woods v. State, 222 Ga. 321, 149 S.E. 2d 674 (1966). Accordingly, a constitutional challenge that will affect jury instructions cannot be raised after the jury charge. Boyers v. State, 198 Ga. 838, 843, 33 S.E. 2d 251, 254-55 (1945).

What these and all of the other related cases have in common is that the constitutional challenge was raised after a ruling, verdict, judgment, etc., that would have been affected by the challenge if it had been brought to the lower court's attention earlier. The Court's approach to these situations has been consistent with the general policy on the raising of claims and defenses generally and evidentiary objections in particular: a litigant waives a claim or objection if he allows the court to make a ruling or allows evidence to be introduced without first making the relevant claim or objection known to the court.

Not only was Mr. Allison's amendment timely under the standards set by prior case law, but under applicable statutory

standards as well. "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pre-trial order." Ga. Code §81A-115(a). (There was no pre-trial order entered in the instant case.) "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Ga. Code §81A-115 (c).

In short, the suggestion that Petitioner's ability to raise a constitutional defense might be prejudiced merely by the passage of time prior to trial appears in no case or other authority prior to the decision in the instant action.

2. The rule does not reasonably serve a legitimate state interest - Henry v. Mississippi, supra, is remarkably analogous to the instant case. In Henry, a criminal defendant's attorney failed to object to the introduction of evidence obtained during an i legal search and seizure, but sought to raise the objection in a motion for directed verdict. The state courts overruled the objection on the ground that it was waived by the failure to assert it when the evidence was first tendered - the so-called contemporaneous objection rule.

The Henry Court found that the rule generally served a legitimate state purpose (it "gives the court the opportunity to conduct the trial without using the tainted evidence" id. at 448), but questioned whether that purpose was not equally well-served in the particular trial by raising the objection by the motion for directed verdict. If so, then "enforcement of the rule here would serve no substantial state interest." Id. at 449. In such a situation, the procedural rule should not be applied "mechanistically to defeat the ends of justice." Chambers v.

Mississippi, supra at 302.

In the instant case, Petitioner does not question the legitimacy of the general rule of timely presentation of constitutional issues - that such issues must be presented to the court at its first opportunity to rule. But here that rule was unquestionably complied with. Petitioner raised his constitutional defense by written amendment prior to trial, and the trial court considered and ruled on that defense.

The ruling of the Georgia Supreme Court - that Mr. Allison's claim was nevertheless barred because of the passage of time between the completion of discovery and the filing of the amendment - does not serve the interest addressed by the general rule. That interest is similar to the one discussed in Henry - to assure that the lower court can conduct the trial fully aware of relevant constitutional issues. But that interest would not have been better served by raising the defense in 1976, as opposed to 1979. 5/

5/ Nor would judicial economy generally have been served. The Georgia Supreme Court speaks somewhat disingenuously about allowing a Defendant "to delay asserting his defenses indefinitely in hopes that a decision will be rendered which provides him with an arguable constitutional defense." Allison v. Fulton-DeKalb Hospital Authority, supra at 446. There is, in fact, nothing in the record that suggests a connection between the timing of the filing of Mr. Allison's defense and any delay in the trial of the case. Nor could there be since

In short, the rule announced by the Georgia Supreme Court could not have been predicted on the basis of prior decisions. Nor does it serve any readily discernible legitimate state interest. Indeed, the record discloses no prejudice of any kind to the court or to the opposing party as a result of the timing of the filing of Petitioner's challenge.

The implications of this rule for litigation in Georgia under both the state and federal constitutions are substantial. A litigant could heretofore feel secure that a constitutional challenge was timely raised if filed before the first occasion for the trial court to consider it. Now the timeliness of the filing of a constitutional challenge will be measured against the time when the challenge theoretically could have been filed. The courts will then have to determine (despite the lack of any prejudice to the court or other parties) whether the intervening time was so great as to bar the raising of the claim. Such a standard is manifestly fuzzy, subjective, and consequently subject to wide variation among the courts.

Because the procedural rule announced in the instant case fails the Henry test and because of the great impact this rule will have on constitutional litigation in Georgia, Petitioner prays that this Court issue a writ of certiorari to the Georgia

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5/ Petitioner's counsel did not consider that defense until the decision in Orr v. Orr was announced and was not aware of that case prior to the announcement. Far from delaying the assertion of the defense, Petitioner filed it with the trial court just eighteen days after Orr was decided.

Supreme Court and, ultimately, to return this case to that Court for full consideration of his constitutional defense.

SUBSTANTIALITY OF FEDERAL QUESTION (RULE 15-1(e))

Up to this point Petitioner has sought review by this Court of the procedural rule which barred him from fully presenting his federal constitutional defense in the state courts. Alternatively, Mr. Allison presents for this Court's consideration under its appellate jurisdiction, the trial court's ruling on the constitutional defense itself - holding that Georgia Code Section 75-105 was constitutional as applied. 6/

The question whether a federal law claim has been properly presented in the state court to entitle the litigant to review in this Court is an issue of federal law for this Court to decide. Saunders v. Shaw, supra; Henry v. Mississippi, 7/

6/ Petitioner emphasizes the question of the procedural rule because of its impact on the litigation of constitutional issues in the Georgia State courts. Moreover, Petitioner believes it appropriate to be given an opportunity to have his constitutional defense considered and ruled on by the Georgia Supreme Court. Thus, Petitioner has urged the issuance of a writ of certiorari on the first question presented.

However, for reasons discussed below, the second question - the constitutionality of Ga. Code §74-105 - is within this Court's appellate jurisdiction. Therefore, if the Court chooses not to grant the petition for certiorari on the first question, Mr. Allison presents this case as an appeal for a resolution of his constitutional challenge to the state statute. Accordingly, the rulings of the trial court are attached hereto to show the constitutional rulings appealed to the Georgia Supreme Court.

7/ The precise question in the instant case is

supra; Love v. Griffith, 266 U.S. 32 (1934). Here, the constitutional question was presented to the trial court, was ruled on by the trial court, and was presented on appeal to the Georgia Supreme Court. Mr. Allison could have done no more. See Saunders v. Shaw, supra.

The instant case presents a substantial federal question, namely the application of this Court's holding in Orr v. Orr, supra to a state child support statute which placed the burden of providing necessaries to minors exclusively on the father.

Specifically, the issue is whether a statute that makes a minor child's father exclusively liable for necessaries furnished to the child violates the equal protection clause of the fourteenth amendment to the United States Constitution. While this Court's analysis in Orr suggests that such a statute would be constitutionally offensive, that question has not been ruled on by either this Court or the Georgia Supreme Court.

In this case, a sixteen year old minor was furnished

7/ whether the procedural ruling of the Georgia Supreme Court, holding that Mr. Allison's constitutional defense was not timely presented, bars this Court from considering the merits of that defense on appeal. Such was the specific issue raised in Henry. Under the analysis discussed in the previous section, supra, the procedural rule applied by the Georgia Supreme Court, not serving a legitimate state interest, would not bar review by this Court of Mr. Allison's constitutional challenge.

medical services. In the absence of any agreement to pay, the challenged statute made the minor's father liable for those medical services, but not the minor's mother. The issue is: does a statute that makes the male parent, but not the female parent, liable rationally serve a constitutionally legitimate governmental purpose?

The obvious rationale for this statute is an assumption about the respective responsibilities of a mother and father with regard to the support and maintenance of their children. That is, the statute clearly rests on the proposition that the mother is responsible for staying at home and raising the child, while the father is responsible for providing financial support for the child. In 1975, the year that the instant law suit was filed, the United States Supreme Court categorically rejected the argument that a gender-based statutory classification could rest on the notion that "generally it is the man's primary responsibility to provide a home and its essentials." Stanton v. Stanton, 421 U.S. 7, 10 (1975). The court went on to add: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas." Id., at 14-15.

Seen in the most favorable light, the statute challenged here is a crude attempt to cast the support responsibility on the parent that the legislature assumed actually provided the financial support for the family. But, of course, the fact is that for a long time mothers in substantial numbers have engaged in gainful activity either to supplement the family's income or, in many cases, to provide the primary source of support for the family. While it is arguably reasonable to cast the support burden on the parent actually providing the support, it is manifestly unreasonable

to use a classification based solely on gender "as an inaccurate proxy for other more germane bases of classification." Craig v. Boren, 429 U.S. 190, 198 (1976).

It might be argued that the classification, while inaccurate, is at least easy to apply. But certainly it is no more easy to apply than the current statute which makes both parents jointly responsible for the support of minors. Moreover, the United States Supreme Court has held that "administrative ease and convenience" is not a legitimate governmental purpose that will support a gender-based classification Stanley v. Illinois, 405 U.S. 645, 656 (1972); Frontiero v. Richardson, 411 U.S. 677, 690 (1976). Neither will the avoidance of "intrafamily controversy" provide such a basis. Reed v. Reed, 404 U.S. 71, 77 (1971).

In short, the statute challenged here rests on assumptions about the distribution of responsibilities within the family, which are frequently inaccurate and which the United States Supreme Court has held can not serve as the basis for the statutory distribution of burdens and benefits on the basis of gender.

CONCLUSION

Because the first issue presented in this petition has a profound impact on constitutional litigation in the Georgia state courts, Petitioner urges that this Court grant a writ of certiorari to consider that question. Alternatively, since the second issue presents a substantial federal question within the mandatory appellate jurisdiction of this Court, Mr. Allison asks that the Court note probable jurisdiction and set the case down for briefing and oral argument.

Respectfully submitted,

KENNETH G. LEVIN

RICHARD K. GREENSTEIN

79-6743

RECEIVED
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GLOVER ALLISON,

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- Versus -

FULTON-DEKALB HOSPITAL AUTHORITY,

~~Respondent and~~ Appellee.

~~ON PETITION FOR WRIT OF CERTIORARI AND~~

APPEAL FROM THE SUPREME COURT OF GEORGIA

CASE NUMBER 35689

ATTACHMENTS TO ~~PETITION FOR WRIT OF CERTIORARI AND~~ JURISDICTIONAL STATEMENT

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construction would fly in the face of the General Assembly's clear expression of intent to trigger the 1973 Act by appropriating $26,920 for that purpose.

At this point, with the 1973 Act having taken effect on January 1, 1975, the General Assembly reenacted the former Bank Share Tax Act, effective January 1, 1975. Ga. L. 1975, pp. 147, 152-153 (the 1975 Act). The dispute between C&S and the city and county is whether the "no tax on capital clause" in the 1975 Act, Ga. L. 1975 at p. 149, exempts national banks such as C&S from all ad valorem taxes other than those authorized by the Act. C&S takes the position that "capital" in this phrase means "capital assets" and exempts all property of the bank except real property. The city and the county argue that the "no tax on capital" provision is merely a recital (i.e., is surplusage) or, alternatively, that capital as used therein means only capital stock. Although the word "capital" is not defined in the Act and more than one construction is arguable, in light of the legislative history we hold that "capital" as used in the "no tax on capital" clause in the 1975 Act refers to capital assets; thus the 1975 Act does exempt C&S from ad valorem taxes levied on its personal property. If the General Assembly had intended to alter the long standing effect of the "no tax on capital" clause, it no doubt would have done so in clear and express terms. By using the historical language, it evidenced its intent that banks be given the same tax treatment they historically had received.

The city and the county argue that the express exemption of banks from the assessments authorized by the Intangible Property Tax Act of 1937 militates against this construction. Ga. L. 1937-1938, Ex. Sess., pp. 156, 158. But this express exemption was necessary to avoid a possible repeal by implication of the banks' pre-existing exemption under the Bank Share Tax Act.

The city and county also argue that the General Assembly's 1976 amendments expressly recreating the banks' exemption from personal property taxes, Ga. L. 1976, pp. 405, 407, 408, establish that the 1975 Act provided no such exemption. In our view, the General Assembly by enacting this amendment was merely clarifying the 1975 Act in response to the attempted

assessment of the bank's personal property. We view this amendment as reenacting the Bank Share Tax Act rather than as undercutting it. We find that it was the intent of the General Assembly in the 1975 Act, as it was in the 1976 Act, not to tax national banks to the extent now authorized by Congress.

The trial court's order granting summary judgment to the City of Atlanta and to Fulton County must be reversed, and an order granting summary judgment entered on the motion filed by C&S.

Judgment reversed. All the Justices concur, except Marshall, J., who concurs in the judgment only, and Nichols, C.J., who is disqualified.

ARGUED OCTOBER 10, 1979 — DECIDED FEBRUARY 19, 1980 — REHEARING DENIED MARCH 13, 1980.

Ad valorem tax dispute. Fulton Superior Court. Before Judge Hicks.

Alston, Miller & Gaines, G. Conley Ingram, Franklin R. Nix, Michael G. Wasserman, for appellant.

James A. Barnett, Harold T. Daniel, Jr., for appellees.

35689. ALLISON v. FULTON-DEKALB HOSPITAL AUTHORITY.

HILL, Justice.

In February, 1975, Fulton-DeKalb Hospital Authority, operator of Grady Memorial Hospital, sued the defendant for hospital expenses incurred by his 16-year-old daughter the previous August during the birth of an illegitimate child.

The defendant answered with a general denial, but amended the answer more than four years later to include a constitutional challenge to Georgia's paternal child support statute, Code § 74-105, under the rationale of Orr v. Orr, 440 U. S. 268 (99 SC 1102, 59 LE2d 306) (1979), decided shortly before by the United States Supreme

Court.

The Georgia statute, Code § 74-105 (revised effective April 4, 1979, Ga. L. 1979, pp. 466, 492), provided that the father is under a duty to provide for the maintenance, protection and education of his child until majority. The trial court, sitting without a jury, concluded that the constitutional defense should not be given retroactive effect and that the father was nonetheless under a common law duty of support in the absence of statute. The trial court further concluded that the hospital had made a sufficient showing to sustain its case including a showing that the defendant's minor daughter was not emancipated. The defendant's motion for a new trial was denied and he appeals.

1. Defendant's first enumeration of error alleges that the trial court erred in overruling his constitutional attack. Constitutional challenges must be raised at the first opportunity. *Brackett v. State*, 227 Ga. 493 (181 SE2d 380) (1971). Constitutional challenges should be raised as soon as the law which is subject to constitutional objection comes to the attention of the challenger's attorney. 5 EGL 530, Constitutional Law, § 182.

In this case the original answer was filed March 10, 1975, and was not amended to include the equal protection challenge until March 23, 1979, after the March 5, 1979, decision in Orr, supra. At least four continuances had been obtained during the four-year period. The record clearly shows that defendant had an ample opportunity to ascertain the nature of the hospital's claim and to challenge it before the Orr decision.

In April, 1976, the hospital answered interrogatories showing that its patient had been 16 years old at time of admission, that there had been no express agreement by anyone to pay the charges for her medical treatment, and that the defendant had been billed for his daughter's care because he was her father. At this point the law on which the hospital's claim was based was or certainly should have been known to the challenger's attorney. Yet the constitutional question was not raised until another 2 years and 11 months had passed. A defendant will not be allowed to delay asserting his defenses indefinitely in

hopes that a decision will be rendered which provides him with an arguable constitutional defense. We find that the constitutional question was not timely raised in this case.

2. Defendant contends that the trial court erred in finding that the hospital had proved the elements of its case. Specifically, defendant alleges that the hospital failed to prove that defendant was the father of the patient, that the value of the services rendered was reasonable and that the daughter was not emancipated.

This case was tried before the court without a jury. The trial judge entered findings of fact and conclusions of law. Such findings of fact shall not be set aside on appeal unless they are shown by the appellant to be clearly erroneous. Code Ann. § 81A-152 (a). The findings of fact entered by the trial judge in this case have not been shown to be clearly erroneous.

3. Defendant's final enumeration of error alleges that the trial court erred in finding that Code § 74-9901 (placing "lying in" expenses on the putative father of the illegitimate child), being specific, did not supplant the father's general statutory duty to pay medical expenses for his unmarried minor daughter, Code § 74-105. Code § 74-9901 is a criminal statute which provides that the putative father of an illegitimate child will be guilty of a misdemeanor when he fails to give lawfully prescribed security for enumerated expenses, including the lying in expenses of the mother. The statute does not show that the putative father is solely responsible for such expenses. The trial court properly interpreted the law and refused to discharge the defendant from liability for maternity expenses incurred by his daughter.

Judgment affirmed. All the Justices concur, except Jordan, J., who dissents to Division 1.

ARGUED JANUARY 15, 1980 — DECIDED FEBRUARY 26, 1980 — REHEARING DENIED MARCH 13, 1980.

Action on account; constitutional question. Fulton State Court. Before Judge Beasley.

Richard K. Greenstein, for appellant.

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 3/13/80

The motion for a rehearing was denied today:

Case No. 35689 Allison v. Fulton-DeKalb Hospital Auth. t/a Grady Memorial Hospital

Jordan, J., dissents.

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

IN THE SUPREME COURT OF THE STATE OF GEORGIA

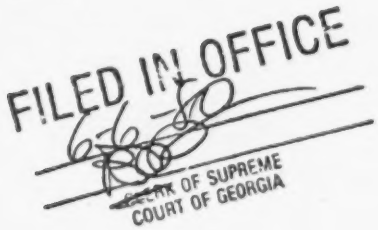
GLOVER ALLISON,

Appellant

-Versus- NO. 35689

FULTON-DEKALB HOSPITAL AUTHORITY, T/A GRADY MEMORIAL HOSPITAL,

Appellee



NOTICE OF APPEAL

GLOVER ALLISON hereby appeals to the Supreme Court of the United States from the opinion and judgment of this Court of February 28, 1980, deciding the appeal in the above-styled case, and from this Court's denial of his Motion for Rehearing by order dated March 13, 1980. This appeal is taken pursuant to 28 U.S.C. §1257(2). At the time of the filing of his jurisdictional statement, Appellant will seek to proceed in forma pauperis.

This 6th day of June, 1980.

Richard K. Greenstein
RICHARD K. GREENSTEIN

Kenneth G. Levin (by RKG)
KENNETH G. LEVIN

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Atlanta, Georgia 30335
524-5811

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Notice of Appeal upon counsel for Appellee by depositing it in the United States Mail with adequate postage affixed thereto, addressed to:

Robert S. Travis
Curtis M. Cook
Attorneys at Law
Suite 203-A, Duncan Square
1961 North Druid Hills Road, N.E.
Atlanta, Georgia 30329

This 6 day of June, 1980.

/s/
RICHARD K. GREENSTEIN
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF GEORGIA

FILED IN OFFICE
3-7-80
CLERK OF SUPREME COURT OF GEORGIA

GLOVER ALLISON,

Appellant,

- Versus -

NO.: 35689

FULTON-DEKALB HOSPITAL AUTHORITY T/A GRADY MEMORIAL HOSPITAL,

Appellee.

MOTION FOR REHEARING

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This is an appeal from a judgment against Appellant for medical expenses allegedly incurred by his minor daughter. Among Appellant's enumerated errors was a challenge to the trial court's ruling upholding the constitutionality of the statute upon which Appellee's claim was based.

Although Appellant's constitutional attack was specifically raised in his amended answer prior to the first consideration of this case by the lower court, this Court held that the raising of the constitutional defense was not timely. (A copy of this Court's opinion is attached hereto.)

Appellant seeks rehearing of this appeal on the following grounds:

1. Having ruled that Appellant did not timely raise his constitutional defense in this litigation, this Court did not have jurisdiction to consider the other errors raised by Appellant and the appeal should be transferred to the Court of Appeals.

2. This Court's ruling that Appellant's constitutional defense was not timely, although it was raised in his amended answer prior to the first consideration of the case by the lower court, is contrary to prior decisions of this Court.

3. The ruling of this Court that Appellant is not entitled to consideration of his constitutional defense, although it was raised in his amended answer prior to the first consideration of this case by the lower court, denies Appellant due process of law in violation of the Fourteenth Amendment to the United States Constitution.

4. This Court's ruling that Appellant is not entitled to consideration of his constitutional defense, although that defense was raised in his amended answer prior to the first

consideration of the case by the lower court, denies Appellant rights available to other similarly situated persons and, therefore, deprives him of equal protection of the laws in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT AND CITATION OF AUTHORITIES

A. Having ruled that Appellant did not timely raise his constitutional defense in this litigation, this Court did not have jurisdiction to consider the other errors raised by Appellant and the appeal should be transferred to the Court of Appeals.

Appellant's enumerated errors in this appeal fall essentially into three categories: (1) that the statute upon which Appellee's claim is based is unconstitutional; (2) that the statute upon which Appellee's claim is based does not create liability in this case; and (3) that the evidence does not support the judgment. The jurisdiction of this Court over the appeal is based exclusively on the first of these alleged errors since the others, by themselves, are within the appellate jurisdiction of the Court of Appeals, rather than the Supreme Court. Compare Ga. Code §2-3104 with Ga. Code §2-3108. This Court has repeatedly and consistently held that where appellate jurisdiction in the Supreme Court is based upon a constitutional issue which the Court finds has not been timely raised in the court below, then it necessarily follows that the Supreme Court lacks jurisdiction over the appeal and the remaining issues must be transferred to the Court of Appeals for a decision. Burnett v. Burnett, 209 Ga. 353 (1952); Taylor v. Smith, 211 Ga. 5 (1954); Hammock v. Davidson Granite Company, 218 Ga. 622 (1963).

If this Court does not change its ruling in division one of the opinion that the constitutional issue was not timely

raised, then the Court does not have jurisdiction over the other errors enumerated in the appeal. Accordingly, division two and three of the opinion, dealing with those alleged errors, should be vacated and the case transferred to the Court of Appeals.

B. This Court's ruling that Appellant's constitutional defense was not timely, although it was raised in his amended answer prior to the first consideration of the case by the lower court, is contrary to prior decisions of this Court.

Appellant's constitutional defense was raised by amendment to his answer prior to the trial of the case or, for that matter, prior to any hearing by the court below. Nevertheless, this Court found that since the amendment was filed several years after discovery, the constitutional defense was not timely raised. This ruling is without precedent.

The Court correctly stated the general rule that constitutional challenges must be raised "at the first opportunity" Brackett v. State, 227 Ga. 493 (1971). The many decisions of this Court applying this rule have uniformally understood "first opportunity" to refer to the first opportunity for a ruling in the court below. Thus, for example, a defendant who is aware of a constitutional challenge that will affect jury instructions can not wait until after the jury charge to make that challenge. Boyers v. State, 198 Ga. 838, 843 (1945). Nor can he raise a constitutional claim after verdict. Brackett v. State, supra. Accordingly, he can not raise the constitutional challenge in a motion for a new trial. Loomis v. State, 203 Ga. 394, 405 (1948); Woods v. State, 222 Ga. 321 (1966).

What these and all of the other related cases have in common is that the constitutional challenge was raised after a ruling, verdict, judgment, etc., that would have been affected

by the challenge if it had been brought to the lower court's attention earlier. The Court's approach to these situations is consistent with the general policy on the raising of claims and defenses generally and evidentiary objections in particular: a litigant waives a claim or objection if he allows the court to make a ruling or allows evidence to be introduced without first making the relevant claim or objection known to the court.

Appellant is unaware of any case in which a constitutional claim was raised by pleading before any hearing in the action, was then asserted during the trial of the case, was ruled on by the trial court, and was nevertheless held to be untimely. The radical change in the test for timeliness brought about by this Court's ruling raises serious problems regarding application of the test. Under the former rule, timeliness was determined with reference to the first opportunity of the trial court to rule on the issue. Under the new rule, the trial court must first determine when the party became aware of the facts on which the constitutional claim is based and then decide whether the claim was pleaded quickly enough thereafter.

What is the standard by which the courts are to determine how long a party can wait to plead the claim? For example, in the instant case, Appellant's amendment raising the constitutional challenge was timely under the Civil Practice Act, which provides that pleadings may be amended at any time prior to the pre-trial order and that amendments relate back in time to the date of the original pleading. Ga. Code §81A-115 Yet the Court found Appellant's amendment untimely. If, then, a defendant is aware of a constitutional challenge when served with the complaint, is the challenge untimely if he waits until the end of the thirty-day answer period to file the pleading containing the challenge? Under the rule announced in this

Court's opinion, it is not at all clear whether the resolution of the question should be different in these two instances.

These issues, of course, do not arise under the former rule: If the litigant is aware of facts that form the basis for the constitutional challenge and if the case has reached a point where that constitutional challenge is relevant to a ruling by the lower court, then the litigant must raise the challenge at that time or waive it. 1/

The trend of this Court's decisions in recent years has been to disallow procedural bars to presenting one's claims where there is no showing of harm either to the court or the other litigants. E.g., Justice v. Dunbar, 244 Ga. 415 (1979). The ruling of the Court in this case represents a clear retreat from that trend since Appellant has been precluded from having a determination of his constitutional challenge without any showing that the manner of raising that challenge either inconvenienced the trial court or prejudiced the rights of the opposing party.

Because the Court's rulings fundamentally changes the former rule regarding timeliness in a manner that raises enormous problems of application and serves no identificable interest of

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1/ Additionally, the litigant will generally be required to make the challenge in writing in a pleading or amendment thereto. Hazlehurst v. Southern Fruit Distributors, Inc., 46 Ga. App. 453 (1933). This allows the reviewing court to determine that the constitutional issue was raised in a precise manner. Again, Appellant complied with this requirement.

the courts and because this rule represents a return to the days when unnecessary procedural rules regularly defeated the raising of meritorious claims, Appellant asks that this Court vacate division one of its opinion and decide the constitutional issue.

C. The ruling of this Court that Appellant is not entitled to consideration of his constitutional defense, although it was raised in his amended answer prior to the first consideration of this case by the lower court, denies Appellant due process of law in violation of the Fourteenth Amendment to the United States Constitution.

When the constitutionality of a statute is drawn into question, it is the responsibility and obligation of the judiciary to resolve that question. Carter v. Carter Coal Co., 298 U.S. 238, 296-97 (1936). The United States Supreme Court has held that a ruling of a state Supreme Court, which effectively prevents a litigant from presenting a claim, may violate the due process clause of the Fourteenth Amendment to the United States Constitution. 2/ Saunders v. Shaw, 244 U.S. 317 (1917). This principle is even more critical when the barred claim is constitutional in nature.

A litigant may waive his right to assert a claim or defense if that waiver is knowingly made. Henry v. Mississippi, 379 U.S. 443 (1965). Where, however, a procedural rule deems a claim or defense waived if it is not timely presented to the

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2/ "[N]or shall any State deprive any person of life, liberty, or property without due process of law."

trial court, such a rule will be considered valid only if it serves a legitimate state interest. Id. at 447-48. In determining whether the procedural rule in question serves a legitimate state interest, both the rule in general and its particular application in the instant case are to be scrutinized. Id. at 448-49.

In general, the rule in question here -- that a constitutional challenge be timely presented in the lower court -- serves the important state interest in judicial economy by requiring that the challenge be presented to the trial court at the first opportunity for the court to consider it. However, as construed and applied in this case, the rule does not serve that purpose. The constitutional challenge raised by Appellant was filed in writing prior to the first hearing on the case in the trial court. Consequently, Appellant did not fail to make his constitutional challenge known to the court at the first opportunity for the court to rule on it. 3/

3/ The court notes in its opinion that the case was continued four times. Of course, these continuances were not unilateral actions on the part of Appellant; rather, they were the result of decisions agreed to by both parties and were requested as a result of various matters deemed important by the parties (discovery, settlement possibilities, etc.). There is no support for any inference that the trial of the case was in any way delayed because of the timing of Appellant's constitutional challenge. As the Court correctly suggests, the timing of the challenge was wholly the result of the appearance of the United States Supreme Court's decision in Orr v. Orr.

In short, under the court's ruling, Appellant cannot obtain a decision on his constitutional defense. Since this bar is the result of a procedural rule that serves no legitimate state purpose, the decision of this court denies Appellant due process of law.

D. This Court's ruling that Appellant is not entitled to consideration of his constitutional defense, although that defense was raised in his amended answer prior to the first consideration of the case by the lower court, denies Appellant rights available to other similarly situated persons and, therefore, deprives him of equal protection of the laws in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Appellant belongs to the general class of litigants who have raised a constitutional challenge by way of pleading prior to the first hearing in the case by the trial court. It is, however, clear from the instant ruling of this Court that some members of that group will be deemed to have timely raised their challenge while others will have their challenge considered untimely. Unless this different treatment of similarly situated litigants is rationally related to a legitimate state purpose, it is violative of Appellant's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution. 4/ Trimble v. Gordon, 430 U.S. 762 (1977).

4/ "[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

For reasons stated in section B above, it is virtually impossible to even determine objectively who within that general class of litigants will have timely raised their constitutional claims. Moreover, for the reasons stated in section C above, the application of the rule in a manner that bars consideration of Appellant's constitutional challenge does not serve a legitimate state purpose. Accordingly, the ruling of this court in division one of its opinion denies Appellant equal protection of the laws in violation of the Fourteenth Amendment.

For all the reasons stated above, Appellant prays that this Court vacate its decision of February 26, 1980, and grant Appellant's Petition for Rehearing.

Respectfully submitted,

Richard K. Greenstein

RICHARD K. GREENSTEIN

ATTORNEY FOR APPELLANT

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

FULTON DEKALB HOSPITAL AUTHORITY T/A GRADY MEMORIAL HOSPITAL, Plaintiff	)	
v.	)	CIVIL ACTION NO. 520625
GLOVER ALLISON, Defendant.	)	

ORDER AND JUDGMENT

This case was tried before the Court sitting without a jury on March 26, 1979. At the conclusion of the evidence and argument, the Court allowed the parties time to file legal memoranda concerning several issues in the case. Defendant filed the same but none was presented by Plaintiff.

Upon a consideration of the evidence, first of all, the Court finds as follows:

1. Defendant's daughter was an unmarried minor at the time of the birth of her illegitimate child on August 19, 1974.

2. Plaintiff's suit is for the balance due on the account for rendering those medical services.

3. At the time Defendant's daughter was admitted to the hospital on the date of the birth, she was brought by her mother, Defendant's wife, who provided the information to the admitting attendant, concerning the name of the minor's parent, the parents' address and telephone number.

4. The services were rendered and the bill was sent; according to the testimony, some small payment was made, and it is a reasonable inference that defendant or his wife made the payment since the bills were addressed to them. There is no evidence that Defendant or his wife denied liability when the statements were sent in 1974.

5. When Defendant's minor daughter became pregnant, she temporarily lived elsewhere and supported herself, awaiting the birth outside of her parents' home because of the sensitiveness of her condition.

6. After the birth, she returned to her parents' home and became supported by them, having stopped working.

7. When Defendant's minor child was admitted to the hospital on August 19, 1974, she made no agreement to be responsible for the charges.

Issues and Conclusions of Law:

1. Whether Plaintiff failed to present admissible evidence to plead each element of its case. The evidence showed that the services were rendered to Defendant's minor child, that the amount claimed is due and owing, that demand was made, that it has not been satisfied, and that Defendant is liable therefor. Each element of the case having been proved, Plaintiff is entitled to judgment.

2. Whether Ga. Code §74-105, stating that it is the duty of the father to provide for the maintenance, protection, and education of his child until majority, is unconstitutional pursuant to Orr v. Orr, 47 Lw 4224, US Sup. Ct #77-1118, 3/5/79. Sims v. Sims, Ga. Sup. Ct. #34242, Ga. Sup. Ct., 3/8/79. The services were rendered and debt incurred in 1974, long before the cases relied upon by Defendant. His common law obligation to support his minor child, insofar as it existed before these latter decisions, was not erased thereby.

3. Whether Defendant's minor daughter became emancipated prior to incurring the medical services, so as to relieve her father of liability for them. The Defendant's daughter did not become emancipated by her temporary removal from the home and retention of her earnings. Even if there was evidence of consent of Defendant to her receiving the proceeds of her own labor, as provided by Ga. Code §74-108, it did not emancipate her to the extent that he became free of his statutory obligation to care for her. Failing to exercise his parental power to receive the monetary fruit of her labor did not thereby relieve him of his responsibility for medical services rendered to his minor daughter at the request of her other parent.

4. Whether the father of the illegitimate grandchild is responsible under Georgia law for the payment of "lying-in" expenses, rather than Defendant.

Whether or not the illegitimate grandchild's father is liable is not at issue in this case, because there is no evidence that he has been required to pay the lying-in expenses. Ga. Code §74-9901. It may be that Defendant would have a claim against him, if Defendant paid, under the proper circumstances. But that is not the issue here. Therefore, it is the VERDICT of the Court that Plaintiff is entitled to recover in the amount claimed, and therefore

JUDGMENT is granted to Plaintiff in the amount of $1570.29 principal and costs.

A copy hereof shall be mailed to each counsel.

This the 19th day of April, 1979.

Dorothy T. Beasley

DOROTHY T. BEASLEY
Judge, State Court of Fulton County

IN THE STATE COURT FOR THE COUNTY OF FULTON

STATE OF GEORGIA

FULTON DEKALB HOSPITAL AUTHORITY T/A GRADY MEMORIAL HOSPITAL,

Plaintiff,

-Versus-

GLOVER ALLISON,

Defendant.

CIVIL ACTION

FILE NO.: 520625

ORDER

This case was heard on Defendant's Motion for New Trial and amendment thereto, on June 13, 1979. Thereafter, the transcript of the trial proceedings was filed. Based on the Motion, arguments of Counsel, and a Supplemental Brief of Defendant, the Motion as amended is ORDERED DENIED. None of the grounds raised required a new trial.

Georgia Code §74-105 is not unconstitutional as it applies to this case. The debt for hospital services was incured in 1974. The father of the minor child cannot escape his responsibility for necessary medical treatment provided to her in 1974 by claiming in 1979 that her mother also should be equally responsible.[1)]

The evidence did not support the contention that Defendant's daughter was an emancipated minor. The record shows that the child was treated November 30, 1974 and gave her father's address as the "billing address." Defendant was listed as her father and the person to be billed. This information was provided to Plaintiff by the child. (T-42). On August 24, 1975, similar data was provided by the patient (T-43). The same was provided on July 23, 1974 (T-46) and on August 19, 1974 (T-47); on the latter date, the information was obtained by Plaintiff from the mother. Information provided when the child was admitted for the delivery was that she stayed with her parents during pregnancy, was living with her father and mother, and had no occupation (T-51). The same information was provided by her mother on May 15, 1974 (T-53) and by the minor on June 5, 1974 (T-54). Her prenatal contact record of June, 1974 shows that she provided information that she was living with her parents, that she had no income, no occupation, that her parents were her source of income, and that her parent's address was her address (T-55).

The testimony also was that Defendant was the father of the minor patient for who the services was provided (T-14).

1) See editorial note to Title 30, Georgia Code, Re: Georgia Laws 1979, S. B. no. 18, Act no. 86.

Defendant is not relieved of his responsibility for caring for the minor child's medical needs by Georgia Code Section 74-9901.

None of the other grounds raised require a new trial to be granted.

A copy hereof shall be mailed to counsel for each party.
This the 31 day of July, 1979.

Dorothy T. Beasley

DOROTHY T. BEASLEY
Judge, State Court of Fulton County

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GLOVER ALLISON,

Appellant,

v.

THE FULTON-DEKALB HOSPITAL AUTHORITY,

Appellee.

ORIGINAL COPY

NO. 79-6743

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Submitted by:
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July 29, 1980

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CASES

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GLOVER ALLISON, Appellant, v. THE FULTON-DEKALB HOSPITAL AUTHORITY, Appellee.	)	NO. 79-6743

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee, The Fulton-Dekalb Hospital Authority, moves to dismiss the appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Georgia on the following grounds: (i) the appeal does not present a substantial federal question; (ii) the federal question sought to be reviewed was not timely raised; and (iii) the judgment rests on an adequate non-federal basis.

OPINION BELOW

This cause was originally heard on March 26, 1979 before the State Court of Fulton County, Georgia, sitting without a jury, and was styled as The Fulton-Dekalb Hospital Authority, T/A Grady Memorial Hospital v. Glover Allison,

Civil Action No. 520625. The judgment of the trial court for plaintiff and denial of the Motion for New Trial are not and will not be reported.

The decision of the trial court was appealed to the Supreme Court of Georgia, styled as Allison v. The Fulton-Dekalb Hospital Authority, No. 35689. The February 26, 1980 decision of the Supreme Court of Georgia to affirm the trial court's decision and the March 13, 1980 denial of the Motion for Rehearing are reported at 245 Ga. 445, _____ S.E.2d _____ (1980).

QUESTION PRESENTED

Should the Supreme Court of the United States take jurisdiction on appeal of a case challenging the constitutionality of a statute, where that statute has been repealed and entirely superseded by a new statute lacking any alleged constitutional infirmities?

STATUTES INVOLVED

1. The new and current Ga. Code Ann. §74-105, enacted in 1979 and effective April 4, 1979, provides:

> "Until majority, it is the joint and several duty of each parent to provide for the maintenance, protection, and education of the child, except to the extent that the duty of one parent is otherwise or further deferred by court order." (Ga. Laws 1979, pp. 466, 492)

2. Former Ga. Code Ann. §74-105, repealed as of April 4, 1979, provided:

> "Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child."

STATEMENT OF THE CASE

On February 5, 1975, The Fulton-Dekalb Hospital Authority [hereinafter the "Appellee"] filed its complaint

against Glover Allison [hereinafter the "Appellant"], for hospital expenses incurred the previous August by his 16-year-old daughter during the birth of her illegitimate child. The Authority had no written contract with Appellant, but contended that Appellant was liable under Georgia's parental child support statute in effect at that time. (Ga. Code Ann. §74-105).

On March 11, 1975, Appellant answered with a general denial. During April, 1976, Appellee answered interrogatories showing that the patient was a minor at the time of her admission to Grady Memorial Hospital; that there was no express agreement by any person to pay the bills for her medical treatment; and that Appellant had been billed because he was the father of the minor patient. Even though counsel for Appellant knew or should have known at that time that Appellee was charging Appellant for the hospital expenses under Ga. Code Ann. §74-105, Appellant made no constitutional challenge to the statute at that time.

On March 5, 1979, two years and eleven months later, the Supreme Court of the United States announced its decision in Orr v. Orr, 440 U.S. 268 (1979). On March 29, 1979, Appellant amended his pleadings to add a constitutional challenge to former Ga. Code Ann. §74-105, alleging that it was in violation of the equal protection clause of the Fourteenth Amendment. Prior to that date, Appellant had not included any constitutional challenge to the statute in his pleadings even though Appellant had full opportunity to do so. Appellant had, however, obtained four continuances since the original complaint was filed, and during the four years prior to the Orr decision.

The trial court allowed Appellant's amendment but held that the alleged constitutional defense should not be given retroactive effect and that Appellant was nevertheless

liable under the common law of Georgia making the father liable for the necessary expenses of a minor child.

On appeal, the Supreme Court of Georgia affirmed and additionally held that Appellant's constitutional challenge was not timely raised in the trial court.

Thereafter, Appellee waived its right to respond to Appellant's appeal to this Court but was subsequently directed by the Clerk to do so on or before July 31, 1980.

ARGUMENT

This Appeal Should Be Dismissed, Or, In The Alternative, The Judgment Should Be Affirmed For At Least Three Reasons, Each Of Which Are Discussed Hereinbelow.

I. No Substantial Federal Question Is Present.

Until April 4, 1979, Ga. Code Ann. §74-105 stated in its entirety:

> "Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child."

Subsequent to the decision in Orr and with the express purpose of complying with the equal protection standards established by this Court in that case, the General Assembly of Georgia repealed this section in its entirety and enacted a new §74-105, completely superseding the former section. Ga. Laws 1979, pp. 466, 492. The new and current §105 states in whole:

> "Until majority, it is the joint and several duty of each parent to provide for the maintenance, protection, and education of the child, except to the extent that the duty of one parent is otherwise or further defined by court order.

This action commenced as a suit against Appellant for a hospital bill under former Ga. Code Ann. §74-105. This

Court has consistently held that when the jurisdiction of a cause of action depends on a statute, the repeal of that statute takes away the Court's jurisdiction and the cases pending at that time fall with the law, unless they are saved by a provision of the statute. Bruner v. United States, 343 U.S. 112 (1952). No judgment will be rendered in a case after the act upon which the case is brought and prosecuted is repealed, and in such a case the Court no longer has jurisdiction of the appeal. Re McCardle, 74 U.S. 264 (7 Wall. 1869).

This appeal is based on the allegation that the former Code §74-105 is void under the equal protection clause of the United States Constitution. The former Code §74-105 was repealed after suit was filed. No provision exists in the new statute to save cases pending at the time of repeal. As thus viewed, no substantial federal question is present and this Court has no jurisdiction to hear this appeal.

II. No Present, Live Controversy Exists.

When the Supreme Court of the United States is to determine the constitutionality of a statute, it must examine the statute as it appears on appeal rather than as the statute existed when the District Court ruled on it. California Bakers Assoc. v. Shultz, 416 U.S. 21 (1974). Furthermore, if the Supreme Court is called on to apply a statute, it must apply the law in effect at the time of its review. Kremens v. Bartley, 431 U.S. 119 (1977); Fusari v. Steinberg, 419 U.S. 379 (1975). A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the new law. Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). Therefore, if the Court is to examine the constitutionality of Code §74-105, it must examine the statute as it now stands, placing the duty of providing the necessary expenses for a minor child jointly and severally on each parent, rather than the statute as it was formerly, placing the duty on the father.

Neither Appellant nor Appellee challenge the constitutionality of the new and current Ga. Code Ann. §74-105. To hear an appeal based on the constitutionality of a state statute, this Court requires that a present, live controversy exist. Kremens v. Bartley, 431 U.S. 119, (1977); Sosna v. Iowa, 419 U.S. 393 (1975). Where the statute in question has been repealed subsequent to a lower court's decision but prior to the Supreme Court's decision, the Supreme Court will vacate the judgment of the lower court and remand the case with instructions to dismiss the case as moot or allow appellants to amend their pleadings. Hall v. Beals, 396 U.S. 45 (1969); Diffenderfer v. Central Baptist Church of Miami, Florida, 404 U.S. 412 (1972). Where a statute's application is challenged on constitutional grounds and that statute is subsequently repealed, being replaced by a new state act absent of the constitutional infirmities, the action has lost its character as a present, live controversy of the kind that must exist if the Court is to avoid advisory opinions of law. Id.

Because of the repeal of former Ga. Code Ann. §74-105, this Court must therefore examine Code §74-105 as it appears on appeal. The parties are not in controversy regarding the constitutionality of the current Code §74-105, and accordingly, the requsite present, live controversy does not exist. It thus follows that this Court should dismiss the appeal.

III. The State Courts Rested Their Decisions On Independent And Adequate Grounds Of State Law, Any Of Which Alone Could Have Been Dispositive Of The Case, Without Reference To The Constitutionality Of Former Ga. Code Ann. §74-105.

In this case, the trial court did not render its decision solely on former Code §74-105. Rather, the decision is premised upon two independent and adequate grounds of state law. First, the trial court held Appellant liable under Georgia's common law making the father liable for the necessary expenses of a minor child, and, secondly, the trial court held that Appellant's constitutional defense to liability under Code §74-105 should not be given retroactive effect, where Appellant claimed that his debt incurred for necessary medical treatment to his daughter in 1974 should be annulled by an act passed in 1979 making the mother equally responsible.

On appeal, the Supreme Court of Georgia affirmed the trial court's decision on grounds regarding Appellant's constitutional challenge to Code §74-105, as well as the independent state procedural ground that Appellant's constitutional challenge was not timely raised. Specifically, the Georgia Supreme Court relied on well-established Georgia law that constitutional challenges must be made at the first opportunity, Brackett v. State, 227 Ga. 493, 181 S.E.2d 380 (1971), and that constitutional challenges should be made as soon as the Appellant's attorney is aware of the law in question. 5 E.G.L. 530, Constitutional Law, §182. In so doing, the court noted that Appellant did not raise his constitutional challenge until two years and eleven months after Appellee answered interrogatories showing that Appellant was billed for his daughter's care because he was her father and stated that Appellant's attorney knew or should have known about the applicable law as of the time he received Appellee's answers to interrogatories. It further noted that Appellant did not file his constitutional challenge to the law until after Orr v. Orr was announced and held that Appellants are not allowed to indefinitely await asserting constitutional challenges, hoping that a decision will

become available providing a constitutional defense. Allison v. The Fulton-Dekalb Hospital Authority, 245 Ga. 445, _____ S.E.2d _____ (1980).

It is fundamental that this Court has no jurisdiction when a state court rests its decision on both state and federal grounds, either of which could have been dispositive. Zacchini v. Scripps - Howard Broadcasting Co., 433 U.S. 562 (1977); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U.S. 157 (1917). Further this Court is without power to hear a constitutional argument when the state court's decision is based on an independent and adequate state ground, Orr v. Orr, 440 U.S. 268 (1979).

In the instant case, it is clear that the Georgia courts rested their decisions on three independent state grounds: (i) Georgia common law imposing liability on the father to pay the necessary expenses of his minor child; (ii) Georgia law that a constitutional challenge should not be applied retroactively so as to nullify a debt already incurred; and (iii) Georgia procedural law requiring constitutional challenges to be asserted at the first opportunity and as soon as a litigant's attorney is aware of the applicable law. Each and all of these constitute independent state holdings for the judgment that are adequate and dispositive, and accordingly, this Court lacks jurisdiction to hear this case on appeal.

CONCLUSION

Simply stated, this appeal raises no substantial federal question; the federal question sought to be reviewed was not timely raised; and the judgment rests on independent and adequate state grounds.

For all these reasons and on the authorities herein cited, we respectfully submit that Appellee's Motion to Dismiss this Appeal, or, in the alternative, affirm the judgment of the Supreme Court of Georgia should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

GLOVER ALLISON,

Appellant

vs.

FULTON-DEKALB HOSPITAL AUTHORITY,

Appellee

CASE NO. 79-6743

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

CASE NUMBER 35689

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

KENNETH G. LEVIN (LEAD COUNSEL)

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I. Introduction.

Appellant Allison wishes to respond to four matters raised in Appellee's just-filed Motion to Dismiss or Affirm. Of course, the response to some of the arguments made in that motion is contained in the original Jurisdictional Statement (and application for certiorari), and Allison will not attempt to repeat any of those arguments here.

II. Two of the Matters Set Forth in Appellee's Statement of Facts Are Misleading.

At the risk of burdening this brief with trivia, Appellant proposes to clarify two misleading statements contained in the Statement of Facts section of Appellee's brief. The first is its mention (at page 3) of the fact that Appellant obtained four continuances of the case before it was brought to trial. We do not wish this Court to have the impression that those continuances were some sort of delaying tactic, especially since the Georgia Supreme Court has treated Appellant's constitutional argument as though it had been raised for such a reason. On the contrary, the reasons for the four continuances, as related to the undersigned by trial counsel, were: First continuance: to permit Appellee more time to reply to outstanding interrogatories, which had not been timely answered; Second and Third continuances: to allow the parties time to get the father of the child (Appellant's "illegitimate son-in-law") to agree in writing to pay Appellee's bill (which proved futile); Fourth continuance; to permit one of Appellant's witnesses (the mother of the child) to come from Michigan to Georgia to testify at the trial, where inclement weather had closed the court entirely on the scheduled trial day and the witness could not arrange transportation. Opposing counsel agreed to all four continuances. Of course, since Appellee's counsel in this appeal was not trial counsel in the case, they may well have been unaware of the above facts. The second misleading statement, at the top of page 4, suggests that the Georgia Supreme Court actually made some decision on the merits of Appellant's constitutional argument. A perusal of that opinion will easily dispel any such notion.

III. This Court Has Jurisdiction of the Appeal.

Although Part I of the Argument section of Appellee's brief is entitled "No Substantial Federal Question is Present," the substance of the argument is that this Court lacks jurisdiction of the appeal because the Georgia statute involved was repealed and replaced pendente lite. Such a contention in the context of this appeal is utterly without foundation, and the cases relied upon by Appellee are irrelevant to the matter.

In both Bruner and McCardle--the only two cases relied upon by Appellee for this argument--the statute repealed pendente lite was not the substantive statute under legal challenge, but the law giving the court jurisdiction to hear the dispute at all. Plainly, the Georgia Legislature neither did, nor could, enact any statute affecting the jurisdiction of this Court to hear a constitutional challenge to a Georgia statute, nor did they make any attempt to prevent any state court from doing so. Thus when they replaced the law under challenge with a new law applicable to obligations incurred after April 1979, they did nothing at all to affect the jurisdiction of this Court to hear a constitutional challenge to the law as it formerly existed. The most that Appellee could even logically argue is that the change mooted the appeal, which they have in fact done in the next section of their brief, to which we respond in a moment. The jurisdictional argument, however, is frivolous.

IV. This Appeal is Not Moot.

Appellant certainly does not quarrel with the general proposition urged in Part II of Appellee's brief that a present, live controversy must exist between the parties in order for this Court appropriately to rule on the appeal. Unfortunately, the repeal of the law under challenge and its replacement with a new law has in no way terminated the dispute between the parties, or, indeed, between any parties to a claim that arose before April 1979. Appellant would be only too happy for Appellee to acknowledge that the repeal of former Ga. Code Ann. §74-105 leaves it

without any legal claim against him, in which event this controversy would surely be moot. But Appellee has done no such thing. On the contrary, it has continued actively to pursue its money claim against Appellant, and, should it prevail in this Court, presumably intends to enforce its judgment by all means available to it under Georgia law. Thus the controversy is every bit as "live" as it was when this lawsuit was first filed several years ago.

The case cited by Appellee for the proposition that this Court must ordinarily apply the law in effect at the time of its decision are inapposite. California Bankers Association v. Shultz, 416 U.S. 21 (1974) was an effort to enjoin as unconstitutional certain proposed banking regulations that were voluntarily modified by the defendant without ever having been put into effect in their original form. This Court merely held that the plaintiffs could not question the constitutionality of rules that had not taken, and for all that appeared never would take, effect. In the instant case, Appellant is challenging a statute that was actually applied against him and continues to be the only basis upon which Appellee predicates its liability against him. Kremens v. Bartley, 431 U.S. 119 (1977) was a class action challenge to parents' rights to mental commitment of minors by plaintiffs, all of whom were at least 15 years old when suit was filed. Pendente lite the statute was changed to remove from its coverage all minors over the age of 13. Since every named Plaintiff could therefore gain immediate release from confinement, and was therefore unaffected by any existing statute, their affirmative action for injunctive relief was plainly moot. Here, Appellant is defending a claim for damages founded expressly on the old statute, so that he is anything but unaffected by it. In Fusari v. Steinberg, 419 U.S. 379 (1975), neither counsel had even bothered to inform this Court that a new statute had been passed during the appeal, much less to explain the effect of that statute. This Court understandably felt obliged to remand so that that information could be provided and considered by the courts below to determine whether or not a continuing controversy still existed. Here, neither the content of the new statute, nor the issue of continuing controversy, is at all in doubt. Finally, Thorpe v.

Housing Authority of Durham, 393 U.S. 268 (1969) sought to establish a constitutionally--based Due Process right to notice to public housing tenants of the landlord's reasons for evicting them. Pendente lite a federal regulation was passed granting the same rights as a matter of law, though not specifying whether or not it would operate retroactively. Since the retroactivity question of this federal regulation was "necessarily governed by federal law," (393 U.S. at 281-2), and since applying it retroactively would avoid a constitutional question, this Court resolved the dispute by applying the regulation retroactively. In the instant case a state, not a federal, law is in question, and there is no need for this Court to speculate about whether or not the new law was meant to apply retroactively because the Georgia legislature has spoken on the subject. In Section I of the amending act as set forth in the Editorial Note to amended Ga. Code Ann. §74-105 (attached as Appendix "A" to this brief), the legislature clearly stated that the law would not be retroactive unless the state or federal constitution absolutely required it. Thus no court can make any decision about whether or not to apply the new law retroactively without resolving the underlying constitutional question here raised (and raising, we believe, serious additional constitutional questions if retroactivity were decreed).

For the above reasons, we submit that this appeal cannot be considered moot unless and until Appellee files a stipulation that it no longer has any legal basis for pursuing its claim against Appellant and does not intend to do so.

V. The Decision Below Does Not Rest on Any Adequate State Ground.

As in the previous section of this brief, Appellant does not quarrel with the general statement of law in Part III of Appellee's brief that an appeal to this Court is improper where the decision below rests on an independent and adequate state ground. One of the most common situations of that kind is a decision by the highest court of a state that a statute is invalid under not only the U.S. Constitution, but also under the corresponding provision of their state constitution.

Because the outcome of the case would be unchanged by any disposition of the federal constitutional question this Court might make, such constitutional questions will not invoke this Court's jurisdiction. No such circumstances exist in the instant case, however, since none of the three rulings treated by Appellee is such an independent state ground.

Two of the three rulings - the second and third from Appellee's brief - may be quickly dealt with. The third one mentioned--the procedural rule created by the Georgia Supreme Court to preclude any ruling by it on the merits of Appellant's constitutional claim--is itself under constitutional challenge in this appeal. We submit that that rule should therefore be disposed of by this Court as urged in Appellant's Jurisdictional Statement. The second ruling referred to, that this Court's ruling in Orr v. Orr, 440 U.S. 268 (1979) "should not be given retroactive effect," is not even a state ground at all, but is a federal ground. It is axiomatic that this Court is the final arbiter of the interpretation and applicability of provisions of the Constitution of the United States. This includes the degree to which new applications of Constitutional principles will be retroactively applied. Indeed, this Court has not only made such rulings on many occasions, but has established detailed standards for deciding whether or not court rulings will be applied retroactively. See extensive discussion in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The first of the three rulings--that the trial court based her ruling on a principle of common law rather than, or in addition to, former Ga. Code Ann. §74-105--requires a bit more explanation, for the trial court's order (Conclusion of Law No. 2) does refer to the father's "common law obligation" to support a minor child. Under Georgia law, however, this cannot be an independent state ground (apart from the statutory section), for Ga. Code Ann. §74-105 and the common law support obligation are literally one and the same.

For historical reasons that can only be touched upon here, the Georgia Code consists of a numerically-arranged series of provisions, only some of which are "laws" in the sense usually thought of when discussing state codes. Some of them (the majority) are specific enactments

of the Georgia legislature whose language derives verbatim from a particular legislative act: these are identified in the Georgia Code Annotated not only by code section number (e.g., §74-105), but also by Act number (e.g., Acts 1979, pp. 466, 492, which is now Ga. Code Ann. §74-105, or Acts 1869, p. 132, which is codified as Ga. Code Ann. §75-208). Others, including former Ga. Code Ann. §74-105, are not enactments of the Georgia legislature at all, but are mere concise statements of principles of the common law rule as applied in Georgia, written by a Commission established for that purpose in the mid-19th Century. These were written into the Georgia Code of 1863 in order that all principles of Georgia law, whether derived from English Common Law or from Georgia legislation, might be found in the same place by ordinary people, instead of requiring research by a lawyer or a law librarian. In theory, therefore, since 1863 there has been no principle of common law applicable in Georgia that is not codified in some form in the Georgia Code. A short explanation of this principle appears in the Explanatory Note at the beginning of Volume 1 of the Georgia Code Annotated, at page xxii, a copy of which is attached to this brief as Exhibit "B." If the Court desires further authority for the proposition set forth in this paragraph, Appellant will be happy to file a supplemental brief for that purpose.

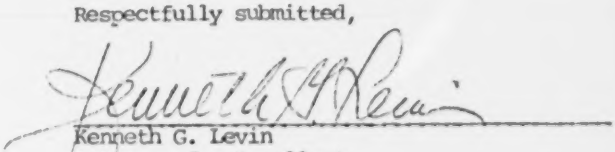
Because of the situation just described, a challenge to the constitutionality of a code section such as former Ga. Code Ann. §74-105 is exactly the same thing as challenging the Georgia common law rule on the subject. Thus, when the trial court referred to the Appellant's alleged common law obligation, she could have only been referring to Ga. Code Ann. §74-105. By definition, therefore, this could not be an independent state ground upon which her ruling, or any decision involving former Ga. Code Ann. §74-105, could rest.

Since one of the three rulings relied upon by Appellee in this portion of its brief is not a state but a federal ground, another is itself an unconstitutional rule under challenge in this appeal, and the third is not an independent state ground, the constitutional questions presented by this appeal are necessary foundations of the Court's rulings below and are properly presented to this Court.

VI. Conclusion.

This appeal presents two distinct constitutional questions, one of which lies within this Court's mandatory appeallate jurisdiction and the other within the certiorari jurisdiction. For administrative reasons, this case has been docketed as an appeal. Virtually the entirety of Appellee's brief in support of its Motion to Dismiss or Affirm has addressed itself to the point of law within the appeal jurisdiction of the Court, but, for the reasons hereinbefore stated, none of these arguments has merit. It is noteworthy that Appellee has had almost nothing to say about the certiorari challenge to the Georgia Supreme Court's barrier to raising the constitutional question, which likewise presents a very important matter to this Court. Thus, for the reasons set forth herein and in the Jurisdictional Statement, Appellant respectfully urges that this Court review his appeal and petition on one or both constitutional grounds, and reverse and remand for further proceedings.

Respectfully submitted,



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support for his 18 year old child was without merit. 241/331 (245 S. E. 2d 290).

Agreement providing support until child becomes of age rendered prior to adoption of code section means support payments must continue until child reaches 21 years of age. 244/606 (261 S. E. 2d 388).

74-105 (3030) Parents' obligation to child

Until majority, it is the joint and several duty of each parent to provide for the maintenance, protection, and education of the child, except to the extent that the duty of one parent is otherwise or further defined by court order.

(Acts 1979, pp. 466, 492, eff. April 4, 1979.)

Editorial Note

Acts 1979, pp. 466, 492, entirely superseded the former section.

This 1979 Act, which extensively amended Title 30, and which also amended Chapters 53-5, 74-1, 74-2, 99-9A, 105-12, and 105-13, provides at Section 1 thereof as follows:

"It is the intent of this Act to revise and modernize certain laws of this State which relate to intrafamilial duties, rights, and obligations, including laws relating to divorce, alimony, support of minors, husband and wife, parent and child, enforcement of support, and related matters, so as to comply with those standards of equal protection under the law announced in the United States Supreme Court decision in the case of *Orr v. Orr*, decided March 5, 1979. This Act and the provisions hereof shall be liberally construed to effectuate the purposes of this Act.

"It is the intent of the General Assembly and of this Act that no contract made or judgment, order, or decree rendered prior to the effective date of this Act should be overturned, modified, or disturbed by reason of the provisions of this Act and that no such contract, judgment, order, or decree should be overturned, modified, or disturbed except to the extent absolutely required by the Constitution of this State or of the United States. Nothing in this Act, however, shall be construed to prohibit modification of judgments, decrees, or orders to the extent such modification is expressly authorized by statute. Nothing in this Act shall be construed to authorize any court to entertain any claim of Constitutional right, which claim is barred because it was not timely raised in any previous judicial proceeding. This Act shall be construed to effectuate its intent to insure the well-being of the people of this State by insuring, wherever possible, continuity of administration, validity, and execution of all existing provisions whether judicial, contractual, or otherwise for support of people of this State."

ANNOTATIONS

Applied. 244/32 (257 S. E. 2d 537).

Child support

In action to revise award of child support, once evidence has been introduced showing substantial change in income or financial status of former husband, evidence relative to former wife's income or financial status is admissible. 244/197 (259 S. E. 2d 453).

Constitutionality

Questions concerning constitutionality of State's alimony laws could not be raised in contempt proceedings if such issues were not timely and properly raised at trial. Dismissal of attachment for contempt was reversed. 243/736 (256 S. E. 2d 465).

Statutes under which appellee was awarded alimony and child support were unconstitutional and appellant was entitled to new trial on issues of alimony and child support only. Appellant's contention that award of attorney's fees was excessive was without merit. 243/763 (256 S. E. 2d 446).

Where defendant answered with general denial of debt, but amended his answer four years later to include constitutional challenge to section under *Orr v. Orr*, constitutional question was not timely raised. Defendant will not be allowed to delay asserting his defenses indefinitely in hope that decision will be rendered which provides him with arguable constitutional defense. 245/445.

Exhibit "A"

omitted and the reason for their omission. A similar table shows where the Acts from 1910 to date have been codified and why certain Acts or sections of Acts have been omitted.

At the end of each section, in parentheses, is shown the source from which the section is codified. Where more than one Act is cited, the meaning, of course, is that the later Act or Acts amend or modify the earlier. Citation of a case following an Act indicates that the decision cited modifies the section as it was adopted originally. In a considerable number of cases, sections have been codified from decisions of the Supreme Court, and these decisions are given as the sources of the sections so derived.

Where no source note is shown, the section usually has come down without change from the Code of 1863, stating a principle of the common law which was included in that Code pursuant to the authority given to the Commissions to include therein the entire body of law of force in this State, from whatever source derived.

Where the source of a section is an Act antedating Cobb's New Digest, published in 1851, the citation is to the Digest rather than to the session laws. This is because the volumes containing the session laws prior to 1800 are practically nonexistent, and all those prior to 1851 are exceedingly rare. A reference to the Act of a particular year, followed by "Cobb," etc., means an Act adopted in the year indicated, and included in Cobb's Digest at the given page.

Cobb's Digest contains the Penal Code of 1833 as amended up to the time of the publication of the Digest. A reference to a section of that Code is simply to the page in "Cobb" on which it appears, no Act being cited.

Editorial Notes

Sometimes it has seemed desirable to give the history of a section, to point out its possible unconstitutionality, to explain a change in it, or to call special attention to some other section or Title in connection with it. Editorial notes have been freely used for such purposes. It is hoped that they will be of assistance in the intelligent use of the Code. The Title embodying the Constitution of Georgia, especially, is liberally furnished with such notes.

General Laws of Local Application

The practice has grown up of evading the provision of the Constitution forbidding the enactment of a "special law in any case for which provision has been made by an existing general law," by passing laws general in form but with operation limited to counties having a certain population, or to those containing cities of a certain size. In nearly every case the limits are so fixed as to embrace only a single county. The Code of 1910 contains a considerable number of such laws. At the time that Code was adopted this type of legislation was just beginning. The volume of

Exhibit "B"